108-418

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 294.

MORTON E. POST, PLAINTIFF IN ERROR,

vs.

JOHN B. PEARSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED SEPTEMBER 30, 1880.

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1 *Summons.*

TERRITORY OF DAKOTA,
First Judicial District, ss:

In the district court in and for Lawrence County.

JOHN B. PEARSON, pl'ff,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners doing business under the firm name and style of Keets Mining Company, def'ts.

The Territory of Dakota sends greeting to the above-named defendants:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber at his office, in the city of Deadwood, D. T., within thirty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer this complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated at Deadwood, D. T., this 28th day of December, A. D. 1877.

H. P. BENNET,
Plaintiff's Attorney.

2 (Endorsed:)

TERRITORY OF DAKOTA,
County of Lawrence, ss:

OFFICE OF SHERIFF.

I hereby certify that I received the within summons on the 29th day of December, A. D. 1877, and personally served the same on A. W. Whitney, one of the within-named defendants, on the 29th day of December, A. D. 1877, and on M. E. Post, the other defendant, on the 10th day of January, A. D. 1878, by delivering to said defendants personally in said Lawrence County, D. T., a copy to each of said summons, together with copies of the complaint in action.

Deadwood, D. T., Jan. 16, 1878.

JOHN MANNING, *Sheriff.*

3 *Amended complaint.*

In the district court, first judicial district of Dakota Territory, in and for Lawrence County.

JOHN B. PEARSON, pl'ff,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners doing business under the firm name and style of the Keets Mining Company, def'ts.

The plaintiff complains and alleges, by way of amended complaint, leave of court first being had—

I. That at the time of the making of the contract hereinafter mentioned, and during all the time subsequent thereto, and until and after the 16th day of October, A. D. 1877, the above-named defendants were copartners in mining business and doing business as such in the county of Lawrence, in the Territory of Dakota, under the firm name and style of the Keets Mining Company.

II. That on the 16th day of July, A. D. 1877, at the town of 4 Central City, in the county and Territory aforesaid, the said defendants entered into an agreement with the plaintiff, whereby and by the terms whereof the said defendants, in consideration that the plaintiff should crush and reduce the same in his stamp quartz mill in said Central City, promised and agreed to and with the said plaintiff to deliver at the plaintiff's said twenty-stamp quartz mill gold-bearing ore and rock from the vein, lode, or deposit of mineral-bearing ore situated on the south side of Hidden Treasure Gulch, in said county, known as the Keets Mine, for the purpose of having the same crushed and milled and the gold extracted therefrom, in quantities sufficient, from time to time, continuously, and during the term of ninety days from and after the said 16th day of July, A. D. 1877, constantly to supply the working capacity of plaintiff's said twenty-stamp mill and keep the same running to such capacity, the same being estimated at the time in said agreement to be about thirty tons daily. That said defendants, in consideration of the crushing and milling of said ores and extracting the gold therefrom, did promise and agree to 5 and with the plaintiff to pay to the plaintiff for the crushing and milling of said ores and the extracting of the gold therefrom the sum of nine ($9.00) dollars per ton for each and every ton of ore so to be crushed and milled and the gold extracted therefrom.

III. That plaintiff, in consideration of the said agreement of the defendants to keep the plaintiff's said twenty-stamp quartz mill constantly supplied with ores as aforesaid, and to pay the plaintiff nine dollars per ton for crushing and milling the same and extracting the gold therefrom as aforesaid, did in and by the terms of said agreement promise and agree to and with said defendants to run said mill constantly upon said ores and not to delay the crushing and milling thereof by running upon other ores for and during the said term of ninety days, commencing on the 16th day of July, A. D. 1877, and ending on the 13th day of October, 1877. And in and by the terms of said agreement it was further understood and agreed between the plaintiff and said defendants that if at any time the ores from said mines should not pay the cost of mining and mill- 6 ing, or if the said mine should fail to produce ores that would pay the cost of mining and milling, then the said defendants might terminate the said agreement by giving to the plaintiff ten days' notice.

IV. That under and in pursuance of said agreement the plaintiff and the defendants entered in & *and* upon the performance thereof, and that the defendants did on and between the said 16th day of July and 20th day of August, 1877, deliver to the plaintiff thirteen hundred and forty tons of ores, which ores the plaintiff crushed and milled and extracted the gold therefrom, in accordance with the terms of his said agreement, and for the crushing, milling, and extracting of gold as aforesaid the defendants become indebted to plaintiff, by virtue of their said *said* agreement, in the sum of $12,060; and further than the said amount of 1,340 tons that the de-

fendants failed to supply plaintiff with ores as agreed. And plaintiff says that at all times during the said 90 days and between July 16 and October
13, 1877, he was ready and willing to comply with and to carry
7 out the and perform all and several the conditions of said
agreement on his part; that his stamp mill was during all of said time of the crushing capacity of thirty tons per day, and fitted and adapted for work and for fulfilling the agreement aforesaid.

V. But plaintiff avers that defendants have failed, neglected, and refused to perform the conditions of said agreement on their part in this: That on and between the 13th and 20th days of August, 1877, the said defendants failed and neglected to keep the plaintiff's said quartz mill supplied with ores, and that in consequence thereof the plaintiff's said mill remained idle at divers and sundry times during said times, in all, forty hours, to the great and special damage of the plaintiff in the earnings of said mill in the sum of $450; and that on the 20th & 21st days of August, the said defendants failed and neglected to keep plaintiff's said mill supplied with ores, and that in consequence thereof plaintiff's mill remained idle, to the plaintiff's damage in the earnings thereof in the sum
of $540; that during all the time from and after the 21st day of
8 August, 1877, untill and including the 13th day of October, 1877,
the defendants failed, neglected, and refused to deliver to the plaintiff at his said mill a sufficient quantity of ores, or any ore whatever upon which the plaintiff could run his said mill, although the plaintiff, during said time, often requested and demanded of the said defendant the said ores. Plaintiff further avers that the failure on the part of the defendants to deliver such ores was not on account of said Keets mine failing to produce ore that would pay the cost of mining and milling the same, but that during all of said time from July 16 to and including October 13, 1877, the said Keets mine did produce a sufficient quantity of ore that would more than pay the cost of mining and milling thereof, to have kept the plaintiff's said mill supplied with ore to its full capacity during the whole of said time.

VI. And plaintiff further alleges that during all the time from and after the said 21st day of August untill and including the 13th day of October, 1877, his said twenty-stamp quartz mill was of sufficient quantity to
crush and mill, and was in condition to crush and mill, thirty tons
9 of gold ores per day, and that the plaintiff, by reason of the failure
and refusal of defendants to deliver said ores as last aforesaid, was compelled to crush and mill ores for other parties at a much less rate per ton than the defendants have agreed to pay therefore, to wit, at the rate of $5.50 per ton, to the great damage of plaintiff in the sum of $5,425.

VII. And plaintiff further alleges that the defendants have not paid to plaintiff the amount due upon said agreement or any part thereof excepting the sum of $7,345.50 paid prior to the 13th day of October, 1877, and that there is now due and owing to plaintiff from said defendants the sum of $11,129.50 with interest thereon from the 13th day of October, 1877.

Wherefore plaintiff demands judgment against said defendants for the said sum of eleven thousand one hundred and twenty-nine and $\frac{50}{100}$ dollars, with interest thereon from the 13th day of October, A. D. 1877, and the costs of this action.

H. P. BENNET,
VANCISE & WILSON, AND
ALBERT ALLEN, *Att'ys for Pl'ff.*

10 (Endorsement:) John B. Pearson vs. Alvin W. Whitney & Morton E. Post. Amended complaint.

In the district court of the first judicial district of Dakota Territory, in & for Lawrence County.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners, &c., as Keets Mining Co.

The defendant, Morton E. Post, separately answering the second amended complaint of the plaintiff herein, denies each and every allegation therein contained.

McLAUGHLIN & STEELE,
Att'y' for Def't M. E. Post.

(Endorsement:) John B. Pearson vs. Alvin W. Whitney & M. E. Post. Separate answer of M. E. Post to 2nd amended comp.

In the district court, first judicial district of Dakota Territory, in and for Lawrence County.

11 JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners, etc., as Keets Mining Company.

The defendant Alvin W. Whitney, separately answering the second amended complaint of the plaintiff, herein denies each and every allegation therein contained, except as herein admitted.

I. He admits that he made and entered into an agreement or contract with plaintiff to crush and mill certain ores at his mill, but says that he has complied with said contract in every particular, and that he owes pl'ff nothing on account of said contract.

II. This defendant says that he continued to furnish ores to said plaintiff's mill from said Keets mine so long as the said mine continued to furnish ores that would pay the cost of mining and milling, but that during the 90 days named in said agreement the ores become low and no
12 longer profitable to mine and mill, and that defendant then gave plaintiff the ten days' notice provided in the agreement and served the same, and was by plaintiff released from further liability to furnish ore.

III. Further answering, this defendant says that at the time of such ceasing to furnish ores plaintiff's mill had been mining for some time upon Keets ore under said contract, and had on hand the results thereof in a large amount of gold amalgam of great value, but that the same was unweighed and undetermined and that while so unweighed and undetermined and of great but uncertain value, the said plaintiff accepted the same in full payment and satisfaction of all demands under said contract, both for work done and ores milled and crushed and for damages thereunder, and did then and there, in consideration of the delivery to him of said amalgam of great but uncertain value, release defendant from all and every liability under said contract.

13 IV. Defendant denies that he is indebted to plaintiff in the sum of $11,129.50, or in any sum whatever, and asks to be discharged, with his costs.

McLAUGHLIN & STEELE,
Atty's for Def't Whitney.

(Endorsement:) John B. Pearson vs. Alvin W. Whitney & Morton E. Post. Separate answer of Whitney to second amended complaint.

Verdict.

JOHN B. PEARSON
vs.
ALVIN W. WHITNEY AND MORTON E. POST,
copartners as the Keets Mining Co.

We, the jury, find for the plaintiff, and assess his damages at $7,500.

GEORGE ATCHINSON,
Foreman.

(Endorsement:) John B. Pearson vs. Alvin W. Whitney & Morton E. Post. Verdict.

In the district court of the first judicial district of Dakota Territory in and for Lawrence County.

14 JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST,
copartners, doing business under the firm-name
and style of Keets Mining Co.

Judgment.

This cause coming on for trial on the regular call of the docket, and the issues having been tried before a jury, and a verdict for the plaintiff having been duly rendered on the 12th day of April, 1879, assessing his damages at seven thousand five hundred dollars, and his costs having been adjusted at $48.95:

Now, on motion of Messrs. Vaneise and Wilson and Albert Allen, counsel for plaintiff, it is adjudged that the plaintiff do have and recover of and from the said defendants the said sum of $7,500 found by the jury, with $48.95 costs, in all the sum of $7,548.95, and that he have execution therefor.

Done in open court this 25th day of April, 1879.

By the court.

G. C. MOODY, *Judge.*

15 (Endorsement:) John B. Pearson vs. Alvin W. Whitney & Morton E. Post. Judgment.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial dist.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, partners, doing business as the Keets Mining Company, defendants.

Case with exceptions.

On the 28th day of October, 1877, the plaintiff above-named commenced an action in said district court by the issuance of a summons and the service of the same, together with a copy of the complaint, which were in the following words and figures, to wit:

16 In the district court of the first judicial district of Dakota Territory in and for Lawrence County.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, partners, doing business under the firm-name of the Keets Mining Company, def'ts.

The plaintiff complains and alleges:

I. That the defendant, by A. W. Whitney, superintendent, on the 16th day of July, A. D. 1877, at the town of Central City, in the county of Lawrence and Territory of Dakota, made and entered into an agreement or contract in writing to and with plaintiff, with mutual covenants under seal, of which a copy is hereto annexed and made a part hereof (Exhibit A).

II. That by the terms of said contract, and for the consideration that
plaintiff promised and agreed to crush ores for defendants, the said
17 defendants undertook and covenanted with plaintiff to deliver at
plaintiff's twenty-stamp quartz mill, in Central City, Lawrence
County aforesaid, within ninety days, commencing on the 16th day of July, A. D. 1877, gold-bearing ores from the Keets mine to the amount of two thousand seven hundred tons, to be delivered in such manner and from time to time so as to supply 30 tons of ore daily, and to keep plaintiff's said quartz mill in constant work, reducing the same during the entire period of said ninety days, with these exceptions, however, to wit: That if the ores therein, and so contracted to be delivered to plaintiff from said Keets mine, shall become to' low to pay the reasonable cost of mining and milling the same, and also in case the said mine should be or become exhausted of its ores, and thereby fail to produce the said quantity of two thousand seven hundred tons in either case, then upon ten days' notice the said contract was to cease and terminate.

III. And plaintiff says that he has fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said contract contained on the part of said plaintiff which he was required to do,
18 and that he has offered and been ready and willing to do all things
necessary in the past and in the future fully and faithfully, as by the terms of said contract he is required to do, and which plaintiff has been prevented from doing by reason of the laches of the said defendants in failing to deliver to the plaintiff at his said mill the said two thousand seven hundred tons of ore, as in said contract agreed and covenanted with plaintiff to do.

III. And plaintiff further says that said Keets mine, from and after the making of said contract, to wit, the 16th day of July, A. D. 1877, and prior to the 15th day of October, A. D. 1877, did produce of ores that would pay the reasonable cost of mining and milling the same two thousand seven hundred tons and more.

V. That defendants neglected and refused to deliver the said ores to plaintiff, as in said contract provided, or any part thereof, excepting about $1,151\frac{490}{2000}$ tons, although so requested to do.

VI. That, while delivering the said $1,151\frac{490}{2000}$ tons of ore, said defendants failed to deliver the same to plaintiff's mill in sufficient quan-
19 tity of at least 30 tons daily, and to keep plaintiff's said mill con-
stantly at work crushing the same for the said period of ninety days, as in said contract the defendants so agreed with plaintiff and covenanted to do, by reason whereof the said mill was stopped and not kept at work at divers and sundry times between the 13th and 20th days of August, A. D. 1877, to wit, for thirty-nine hours and fifty-five minutes, to the special damage of plaintiff in the loss of the earnings of said mill, and in the expenses of keeping the same manned and in readiness, in a large sum of money, to wit, the sum of five hundred dollars.

VII. That the defendants have failed to perform their said contract and agreement with plaintiff, and have failed to pay for the ores so crushed by plaintiff, to wit, for 442 tons thereof, and are oweing to plaintiff thereupon the sum of $3,978.

VIII. That defendants afterwards, to wit, between the 21st day of August and 13th day of October, and while defendants were required by their said contract to furnish the plaintiff with ores to crush, and while their mine was producing ores that would pay to mine and mill,
20 and while plaintiff's mill was of sufficient capacity and in order to
mill 30 tons per day, failed and refused, without good cause or excuse, to furnish plaintiff with any ores whatever, by reason whereof plaintiff was obliged to seek work for his mill elsewhere, and was greatly damaged, to wit, in the sum of $5,000.

Wherefore, plaintiff demands judgment against the said defendants for the said several sums, in all the sum of $9,478, damages, and interest from October 13, 1877, and the costs of this suit.

H. P. BENNETT,
Att'y for Pl'ff.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

John B. Pearson being duly sworn, on oath deposes and says: I am plaintiff in the above-entitled cause; I have heard the foregoing complaint read and know the contents thereof, and that the same are true of my own knowledge.

(S'd) JOHN B. PEARSON.

Subscribed and sworn to before me this day of , 1877.

21 EXHIBIT A.

Memorandum of an agreement made and entered into this 16th day of July, 1877, at Central City, Dakota, by and between A. W. Whitney, superintendent of the Keets Mining Company, parties of the first part, and J. B. Pearson, party of the second part, witnesseth:

I. That said parties of the first part, in consideration of the premises hereinafter mentioned, and subject to the conditions hereinafter stated, hereby jointly and severally undertakes, promises, and agree to deliver at the mill of the said party of the second part at Central City, on Deadwood Gulch, in the county of Lawrence and Territory of Dakota, gold-bearing ore from the vein, lode, or deposit of mineral-bearing ore on the south side of Hidden Treasure Gulch, in the county and Territory aforesaid, and known as the "Keets Mine," for the purpose of being crushed and milled and the gold extracted therefrom; said ore is to be delivered at said mill in quantities sufficient from time to time by said parties of the first part to constantly supply the working capacity of the twenty-stamp 22 mill of the said party of the second now being run at Central City, and which capacity is about (30) thirty tons daily.

II. The said party of the second part, in consideration of the delivery to him at his quartz mill at Central City aforesaid, of gold-bearing ore from the said "Keets mine," do hereby undertake, promise, and agree, jointly and severally, to run said mill constantly upon said ore while there shall be any at said quartz mill, and not delay the crushing and milling thereof by running upon any other ores for a term of (90) ninety days, commencing on the 16th day of July, A. D. 1877, and closing on the 13th day of October, A. D. 1877. It is expressly understood that the parties of the first are to have the entire use of said twenty stamps, as specified in the foregoing:

III. The said parties of the first part hereby undertakes, promises, and agree to pay the said party of the second part for the crushing and milling said ore the sum of ($9.00) nine dollars per ton for each and every ton crushed and milled, in the currency of the United States, or in gold 23 dust, retort, or bullion, at such rates as will make the sum equivalent to said currency, payment to be made after each clean up.

IV. It is further understood and agreed upon that said parties of the first part shall have access to said mill at any time during the contract, for the purpose of examining and inspecting the working of said mill, and may be present in person or by agent at any and all clean-ups and assist thereat, at their own cost and expense.

V. It is further understood and agreed upon that no publicity shall be given of the yield of said ore by the party of the second part, nor of the amount of ore so milled from said mine.

VI. It is further understood and agreed upon that if at any time the ore from said mine shall not pay the cost of mining and milling, or in case of the mine failing to produce, then the said parties of the first part, after reasonable notice, may terminate this contract, such reasonable notice to be given at such time as will enable the party of the second part to get other ores to run his mill, that is, ten (10) days' notice.

24 Witness our hand and seals the day and year first above written.

A. W. WHITNEY. [SEAL.]
Witness. *Sup't Keets Mining Co.* [SEAL.]
Sup't Keets Mining Company.
JOHN B. PEARSON. [SEAL.]

Contract, A. W. Whitney, sup't Keets Mine Co. with John B. Pearson. Correct copy.

And afterwards, and within the time for answering said complaint, to wit, on or about Feb'y 1st, 1878, the defendant Post served and filed his demurrer to said complaint in the words and figures following, to wit:

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial district.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, partners, doing business under the firm name of Keets Mining Company, def'ts.

25 *Demurrer of defendants Morton E. Post.*

Now comes the defendant Morton E. Post and for himself demurs to the complaint of the plaintiff herein for the following good and sufficient reason apparent on the face thereof, to wit:

I. Because there is a misjoinder of parties defendant in this, that said defendant Post is not shown to be a party to the contract mentioned and annexed to the complaint, and is not a necessary party to the action.

II. Because said complaint does not state facts—so far as this defendant is concerned—sufficient to constitute a cause of action.

McLAUGHLIN & STEELE,
Att'ys for Def't Post.

Copy. In district court. John B. Pearson vs. Alvin W. Whitney & M. E. Post. Demurrer of Post. A true copy. McLaughlin & Steele, att'ys for def'ts.

26 And the defendant Whitney, within the time for answering said complaint, served and filed his separate answer to said complaint in the words and figures as the same appears in the judgment roll, and to which reference is here made.

And afterwards to wit, on the seventh day of March, 1878, the said demurrer of the defendant Post came on before the court for hearing, and the following proceedings were then had:

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial district.

JOHN B. PEARSON
vs.
ALVIN W. WHITNEY, MORTON E. POST, partners doing business as the Keets Mining Company, def'ts.

Now, on this 7th day of March, 1878, this cause coming on for hearing before the court, upon the demurrer of the defendant Post to the complaint of plaintiff herein, and which demurrer was heretofore filed herein, 27 after argument of counsel thereon, and the court being fully satisfied in the premises, it is now here ordered and considered by the court that said demurrer of the defendant Post be, and the same is hereby, sustained and leave given to the plaintiff to amend his said complaint, and serve a copy thereof upon the defendants within thirty days from this time.

By the court.

GRANVILLE G. BENNET, *Judge.*

And thereupon and thereafter, in accordance with the leave of the court, plaintiff served and filed his amended complaint within the time specified, as the same appears in the judgmen roll, and to which reference is here made.

And thereupon and thereafter defendant Morton E. Post served and filed his separate answer to the plaintiff's amended complaint, as the same appears in the judgment roll, and to which reference is here made.

And thereupon and thereafter, to wit, on the 14th day of April, 1879, said cause came on for trial, and a jury was empanneled and sworn to well and truly try the issue in said action.

28 Witnesses were produced, sworn, and *and* examined in the presence and hearing of the court and jury, and documentary evidence was introduced; argument of counsel followed, when the jury, after being charged by the court, retired, and, after due deliberation, returned into court the verdict as the same appears in the judgment roll, and to which reference is here made.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial district.

JOHN P. PEARSON, PLAINTIFF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, partners as the Keets Mining Company, def'ts.

It is stipulated and agreed upon, by and between counsel for plaintiff and defendants, that the following facts are established by the evidence on the

trial of this action, and that the following exceptions were taken by the defendant Post to the orders and rulings of the court during the trial of said action:

29 I. That the defendants, Alvin W. Whitney and Morton E. Post, from the 16th day of July, 1877, to the 13th day of October of that year, both dates inclusive, were the owners of the Keets mine, and copartners doing business under the firm-name and style of the Keets Mining Company.

II. That during that time said defendants were engaged in working said mine, and having the ore taken therefrom milled.

III. That A. W. Whitney was the superintendent of the Keets Mining Company during all that time.

IV. That on the 16th day of July, 1877, the contract attached to the original complaint was made by the parties thereto, and defendant Whitney in making the same acted for and in behalf of the Keets Mining Company, and the said contract was made for the use and benefit of the Keets Mining Company, and plaintiff Pearson and defendant Whitney both so understood it, and it was not made or intended as the individual contract of defendant Whitney.

30 V. That the defendant Morton E. Post was a member at that time of the Keets Mining Company, and continued to be a member down to and including October 13, 1877, and as a member of said company received a large portion of the proceeds of said contract knowing whence it came.

VI. That on the 16th day of July, 1877, the plaintiff commenced crushing ore for defendants under said contract and so continued, except as hereinafter stated, up to the 20th day of August, 1877, and received pay therefor according to the terms of said contract, except for the crushing of the last two runs, amounting to $628\frac{1290}{2000}$ tons, for which plaintiff received no pay except the retort from the last run, which retort he tendered to defendant Whitney, and was refused by said defendant, whereupon plaintiff sold said retort to the best advantage, and gave defendants credit for the proceeds thereof, amounting to 941.00, leaving a ballance due plaintiff by defendant for ore so crushed as aforesaid the sum of $4,714.50.

VII. That owing to the failure to keep plaintiff's mill supplied
31 it was idle forty hours between August 13th, '77, and Aug. 20, '77, to the damage of plaintiff $500.

VIII. That the milling capacity of plaintiff's quartz mill was thirty tons daily.

IX. That on the 20th of August, 1877, said A. W. Whitney, sup't Keets Mining Company, served a written notice upon said plaintiff, notifying him that, owing to the Keets mine failing to produce ore that would pay the cost of mining and the cost of milling at plaintiff's mill, that he should terminate said written contract of July 16, 1877, in ten day' thereafter.

X. That said plaintiff's mill was supplied with ore from Keets mine from said 20th day of August, 1877, until and including September 1st, 1877, and that the bullion produced therefrom was offered to said defendant Whitney, who refused to receive the same on the ground, as he testified, that plaintiff had agreed to accept and receive the same when in amalgam on the plates and in the mill, in full satisfaction of what was due to plaintiff, which agreement was denied by the plaintiff in his testimony; and the plaintiff gave defendants credit for the full value of such retort.

32 XI. That the Keets mine, at the time of the execution of said contract, contained sufficient ore, and of sufficient value, to have paid the costs of mining and milling, to have constantly supplied the running capacity of plaintiff's mill during the entire time of the existence of the said contract.

XII. That the ore mined from the Keets mine, and delivered to plaintiff's mill, between the 20th of August to the 1st of Sept., was selected from the lean ore and outside of the ore channel of the Keets mine, by the direction & knowledge of defendant Whitney, and without the knowledge or consent of plaintiff.

XIII. That after the 1st of September, 1877, defendants ceased to supply plaintiff's mill with ore, though often requested so to do, and that plaintiff's mill was kept idle for want of such ore, & while waiting therefor, with steam up and men all employed for two days, at a loss of $270.00 per day, or $540.00.

That after the 2d day of September plaintiff's mill was idle for want of work, defendants still failing and refusing to furnish any ore,
33 through delivering it to other mills, and plaintiff not being able to procure work elsewhere for 14 days, but without men employed, at a loss of $200.00 per day, or a total of $2,800.00. That on or about the 17*st* of September, and as soon as he could do so, the plaintiff procured work for his mill elsewhere, and *and* crushed ore at $5.50 per ton, that being the best figure he could then obtain, and being a loss of $3.50 per ton from the contract price with the defendants, and run his mill on said ore at said price during the ensuing time of said contract, the same being 25 days, or 750 tons, at a loss of $3.50 per ton, making a total loss of $2,625.00 in such time.

XIV. That subsequent to the execution of this contract & during its continuance, the defendant Whitney, as sup't of the Keets Mining Company, made contracts with several other mills to crush ores from said Keets mine at lower rates than the contract with plaintiff, and that during the existence of the said contract with plaintiff mined large quantities of ore from the Keets and delivered the same to said sundry mills and had the same crushed thereat.

XV. That the average cost of mining, hauling, and weighing said ores was $3.00 per ton.

34 XVI. That upon the trial of said action the plaintiff offered the written contract in evidence, a copy of which is attached to and made a part of the original complaint herein, and the same was received without objection; that thereupon the plaintiff sought to prove by A. A. Dewey, S. N. Wood, J. B. Pearson, and other witness', that the defendant Post was an owner in the Keets mine and a member of the Keets Mining Company. Such proof being offered by plaintiff, not for the purpose of explaining, varying, or contradicting said contract, but for the purpose of ascertaining who were the real parties to said contract, and to show that defendant Post was one of the real parties in interest therein and a participant in the results of said contract and for the purpose of charging him upon it, and that defendant Whitney acted, and was acting,

merely as the agent of himself and Post as principals; that the defendant's counsel objected to all such testimony as incompetent and inadmissible, and tending to explain, vary, and contradict the written contract
offered and received in evidence, and which contract was clear, com-
35 plete, and unambiguous in itself; that all such objections were
overruled by the court, to which rulings the defendant Post, by his counsel, then and there excepted; and the testimony of said A. A. Dewey, S. N. Wood, and J. B. Pearson, and other witnesses, established that said Post was an owner in the Keets mine and a member of the Keets Mining Company.

XVII. That after the close of the plaintiff's testimony the defendant Post then produced in evidence the judgment order made herein by the court March 7th, 1878, sustaining the demurrer of the defendant Post to the original complaint of the plaintiff herein, and then moved the court to order a non-suit of the plaintiff so far as the defendant Post is concerned, which motion was overruled by the court, and to which ruling said defendant Post, by his counsel, then and there excepted.

XVIII. That at the close of the evidence defendant Post asked the court to instruct the jury as follows:

The jury are instructed that the judgment order of this court made
March 7th, 1878 (Granville G. Bennett, judge), on the demurrer
36 of said defendant, is a bar to a recovery against def't Post in this
action now as the cause of action is the same, and you will therefor' find for the defendant Post in your verdict, which instruction was refused by the court, and to which refusal to give said instruction as asked to the jury was then and there excepted to by said defendant Post.

VANCISE & WILSON AND
ALBERT ALLEN,
Atty's for Pl'ff.
McLAUGHLIN & STEELE,
Atty's for Def't Post.

(Endorsement:) John B. Pearson vs. Alvin W. Whitney and Morton E. Post. Stipulation & agreed case and exceptions. In district court.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In the district court, first judicial district.

JOHN B. PEARSON, PL'FF,
vs.
A. W. WHITNEY AND M. E. POST, DEF'TS.

37 Now comes the above-named defendant M. E. Post, by McLaugh-
lin & Steele, his attorneys, and moves the court, upon its own minutes in the above-entitled action of the trial, to vacate and set aside the verdict of the jury heretofore rendered in this cause on the 12th day of April, 1879, for the following good and sufficient reasons, to wit:

I. Because there was error in law, occurring at the trial and excepted to by the defendant, through his counsel, in this, to wit, in permitting evidence to be given on the trial of said action tending to show that the defendant Post was a member of the Keets Mining Company, against the objection of said defendant.

II. Because the court erred in allowing any evidence to be given to the jury, against the objection of said defendant, as to who constituted the Keets Mining Company.

III. Because the court erred in permitting any evidence to be given to the jury altering or explaining, modifying or contradicting the terms of the written contract, offered in evidence on the part of the plaintiff, 38 bearing date July 16th, 1877, made by John B. Pearson and A. W. Whitney, superintendant of the Keets Mining Company.

IV. Because the court erred in refusing to non-suit the plaintiff, as requested by defendant M. E. Post, so far as he, Post, was concerned, at the close of plaintiff's testimony.

V. Because the court erred at the close of the testimony and before the case was finally submitted to the jury in refusing the instructions, that the plaintiff could not recover under the written contract against defendant Post.

VI. Because the court erred in reversing the ruling, order, and judgment heretofore rendered in this action at a former term of this court, to wit, at the October term, 1877, wherein it was adjudged on demurrer that no cause of action existed against the defendant Post on said within contract.

VII. Because the verdict of the jury is not sustained by sufficient evidence.

VIII. Because the verdict of the jury is against law.

McLAUGHLIN & STEELE,
Att'ys for Def'ts.

39 To BENNETT & WILSON,
Attorneys for said Plaintiff, John B. Pearson:

Take notice that on Monday, the 21st day of April, 1879, at the hour of ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, the defendant M. E. Post will apply to the court on the foregoing motion to vacate and set aside the verdict of the jury herein.

McLAUGHLIN & STEELE,
Att'ys for Def't M. E. Post.

DEADWOOD, D. T., *April* 18, 1879.

In district court. John B. Pearson, pl'ff, vs. A. W. Whitney et al., def'ts. Motion & notice of def't Post.

In district court, first judicial district of Dakota Territory, in and for Lawrence County.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY ET AL., DEF'TS.

This cause coming on to be heard before the court upon the separate 40 motions of defendants Whitney and Post for a new trial, after hearing Daniel McLaughlin, esq., of counsel for said defendants, in support of said motion, and Messrs. Vancise & Wilson and Albert Allen, plaintiff's att'ys, in opposition thereto, ordered that the said motions for a new trial be, and they are hereby, overruled, and a new trial in this cause refused; to which order and ruling of the court the defendants, by their counsel, duly except.

Done this 25th day of April, 1879.

By the court:

G. C. MOODY, *Judge.*

And thereupon and thereafter, on the same day, judgment in favor of said plaintiff and against said defendants was entered by the court, as the same appears in the judgment roll, and to which reference is here made.

And thereupon and thereafter, and within the time allowed by stipulation and orders of the court, to wit, on the 23d day of June, 1879, the defendant Post presents his case with exceptions to the court, 41 asking that it be allowed and signed and made a part of the judgment roll in this case, which is accordingly done.

By the court:

G. C. MOODY, *Judge.*

TERRITORY OF DAKOTA,
County of Lawrence:

In district court, first judicial district.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners in business as the Keets Mining Company, def'ts.

I, G. C. Moody, judge of the district court of the first judicial district of Dakota Territory, in and for the county of Lawrence, do certify that the foregoing papers, to wit, summons, amended complaint, separate answer of the defendant Whitney, separate answer of the defendant Post, verdict, judgment, and case with exceptions, are contained in and 42 constitute the judgment roll, and the whole of the judgment roll, in the above-entitled case.

G. C. MOODY, *Judge.*

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial district.

JOHN B. PEARSON, PLAINTIFF,
vs.
A. W. WHITNEY AND MORTON E. POST, DEFENDANTS.

To said John B. Pearson, plaintiff, and to Vancise & Wilson, his attorneys:

Take notice that said defendant Post appeals from the judgment heretofore, to wit, on the 25th day of April, 1879, rendered in the above-entitled cause in this court in favor of said plaintiff and against said defendants to the supreme court of Dakota Territory.

This appeal is taken from the whole and every part of said judgment, and upon both questions of fact and law, as will more fully appear 43 in the assignment of errors herein.

McLAUGHLIN & STEELE,
Att'ys for Def't Post.

DEADWOOD, D. T., *Sept.* 19, 1879.

(Endorsement:) In district court. John B. Pearson vs. A. W. Whitney & Morton E. Post. Notice of appeal.
Served Sept. 19, '79.

VANCISE & WILSON,
Att'ys for Pl'ff.

A true copy.
Service admittted September 19th, 1879.

A. R. Z. DAWES, *Clerk.*
McLAUGHLIN & STEELE,
Att'ys for Def'ts.

TERRITORY OF DAKOTA,
First Judicial District, ss:

In the district court in & for the county of Lawrence.

JOHN B. PEARSON, PLAINTIFF,
vs.
A. W. WHITNEY AND M. E. POST, DEFENDANTS.

Whereas, on the 23d day of April, 1879, in the district court within and for the county of Lawrence, the above-named respondents re- 44 covered a judgment against the above-named appellants for seven thousand and five hundred dollars, damages and costs;

And the above-named appellants, feeling agrieved hereby, intend to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellants will pay all costs and damages which may be awarded against them on said appeal or on a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, or said appeal be dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded said appellant on said appeal.

Dated September 22, 1879.

W. R. STEBBINS.	$10,000.
EDWARD CUTHBERTSON.	$2,500.
JOHN McALEER.	$2,500.

45 TERRITORY OF DAKOTA,
Lawrence County:

On this 22d day of September, A. D. 1879, before me, the subscriber, appeared W. R. Stebbins, Edward Cuthbertson, and John McAleer, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

[SEAL.] A. R. Z. DAWSON, *Clerk*,
By J. A. SWIFT, *Deputy*.

TERRITORY OF DAKOTA,
County of Lawrence:

W. R. Stebbins, Edward Cuthbertson, and John McAleer, being severally sworn, each for himself says: The said W. R. Stebbins says he is a freeholder of the county of Lawrence in this Territory, and that he is worth in property not exempt from execution the sum of twenty thousand dollars over and above all debts and responsibilities which he owes or has incurred; and the said Edward Cuthbertson for himself says that he is a freeholder of the county of Lawrence in this Territory, and that 46 he is worth in property not exempt from execution the sum of five thousand dollars over and above all debts and responsibilities which he owes or has incurred; and the said John McAleer for himself says that he is a freeholder of the county of Lawrence & Territory of Dakota, and worth in property not exempt from execution the sum of five thousand (5,000) dollars over and above debts and responsibilities which he owes or has incurred.

W. R. STEBBINS.
EDWARD CUTHBERTSON.
JOHN McALEER.

Subscribed and sworn to before me this 22d day of September, 1879.
[SEAL.] A. R. Z. DAWSON, *Clerk*,
By J. A. SWIFT, *Dep'ty*.

(Endorsement:) Territory of Dakota. In district court, Lawrence County. John B. Pearson vs. Whitney & Post. Undertaking on appeal to Supreme Court. Copy. Approved & filed Sept. 22d, 1879. A. R. Z. Dawson, clerk.

47 TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial dist.

JOHN B. PEARSON, PL'FF,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, copartners, doing business under the firm name of the Keets Mining Co., def't.

Stipulation and agreement.

It is agreed that the judgment roll, certificate of judge to judgment roll,

notice of appeal, and appeal bond to the supreme court of Dakota Territory from the judgment rendered herein in favor of said plaintiff and against said defendants were all destroyed by fire in the town of Deadwood, in the said county and Territory, on the 26th day of September, 1879; that the judgment roll comprised the summons, with the sheriff's return thereon, the amended complaint of plaintiff, the separate answer of the defendant Post, the separate answer of the defendant Whitney,
48 the verdict of the jury, the judgment and the case with exceptions of the defendant Post signed by the court and ordering same to be made part of the bill of exceptions, certificate of judge to the judgment roll, the notice of appeal, and the appeal bond to the supreme court; and it is stipulated by and between counsel that the annexed are true and correct copies of the records and papers so destroyed, and that they may be by order of the court substituted for and stand in lieu of and have the same force and effect as originals.

Deadwood, D. T., Feb'y 12, 1880.

VANCISE & WILSON, AND
ALBERT ALLEN,
Att'ys for Plaintiff.
McLAUGHLIN & STEELE,
Att'ys for De'ft Post.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

In district court, first judicial dis't.

49 JOHN B. PEARSON, PL'FF,
vs.
AL[illegible] W. WHITNEY AND MORTON E. POST,
copartners, doing business under the firm name
of the Keets Mining Company, def'ts.

Upon the foregoing stipulation of counsel for the respective parties in the above-entitled action, and it appearing to the satisfaction of the court that the process, pleadings, verdict, judgment, case, with exceptions comprising the judgment roll in said action, and certificate of judge to judgment roll, the notice of appeal to the supreme court of the Territory, and the bond given to stay execution, were all destroyed, together with the records of the court, by fire in the town of Deadwood Sept. 26th, 1879, and being further satisfied that the annexed papers are true and correct copies of those destroyed, it is thereupon ordered by the court that the annexed papers be substituted for the judgment roll, notice of appeal, and appeal bond in this action in this court in the place of the original, and that they have the same force and effect.

Deadwood, D. T., Feb'y 13th, 1880.
By the court.

G. C. MOODY, *Judge.*

50 (Endorsement:) In district court, Lawrence County, D. T. John B. Pearson vs. Alvin W. Whitney et al. Filed February 13th, A. D. 1880. A. R. Z. Dawson, clerk, by Frank J. Washabaugh, deputy.

TERRITORY OF DAKOTA,
County of Lawrence, ss:

I, A. R. Z. Dawson, clerk of the district court of Lawrence County, in the first judicial district of Dakota Territory, do hereby certify that the within and foregoing is a full, true, correct, and complete transcript and copy of the judgment roll, case, and other papers in the case of John B. Pearson vs. Alvin W. Whitney et al. as the same remains of record on the files & minutes of said court.

Witness my hand and the seal of said court this 28th day of February, A. D. 1880.

[SEAL.]
A. R. Z. DAWSON, *Clerk,*
By FRANK J. WASHABAUGH, *Deputy.*

(Endorsement:) In supreme court, Territory of Dakota. May term,
1880. J. B. Pearson, plaintiff & respondent, vs. Alvin W. Whit-
51 ney et , def't & appellant. Filed in my office this 24th day
of March, 1880. B. S. Williams, clerk.

In supreme court of Dakota Territory.

JOHN B. PEARSON, PL'FF AND RESPONDENT IN error,
vs.
ALVIN W. WHITNEY AND MORTON E. POST, defendants and appellants in error.

Assignment of errors by Morton E. Post.

The appellant Morton E. Post says there is manifest error on the face of the record in this—

1. That the court erred in admitting parol testimony to explain the written contract of July 16th, 1877, between John B. Pearson and A. W. Whitney in this, that such testimony tended to show that the contract was made for and on behalf of the Keets Mining Co., by A. W. Whitney, while the contract itself shows it was made by and between said Pearson and said Whitney.

2. That the court erred in admitting parol testimony to vary
52 and contradict the written contract of July 16th, 1877, between
Pearson and Whitney in this, that such testimony tended to show
that the contract was not the contract of Pearson and Whitney, but of Pearson and the Keets Mining Company, an association or copartnership composed of Whitney and Post.

3. That the court erred in refusing to non-suit the plaintiff, as requested by the defendant Post, upon the production of the judgment on demurrer in this case rendered by the court March 7th, 1878, in favor of said defendant Post and against the plaintiff.

4. That the court erred in refusing to instruct the jury that the judgment on demurrer theretofore rendered in *in* said action was a bar to a recovery against the defendant Post, and that the jury should find for said defendant.

McLAUGHLIN & STEELE,
Attorneys for Appellant Morton E. Post.

MARCH 18, 1880.

(Endorsement:) In sup. court. John B. Pearson vs. A. W. Whitney, Morton E. Post. Assignment of errors. Filed in my office this 3d day of April, A. D. 1880. B. S. Williams, clerk. McLaughlin & Steele, att'ys for appellants.

53 THE UNITED STATES OF AMERICA,
Territory of Dakota, ss:

In the supreme court, May term, A..D. 1880.

JOHN B. PEARSON, RESPONDENT, *vs.* MORTON E. POST, IMPLEADED WITH ALVIN W. Whitney, appellants.	Appeal from the district court of Lawrence County.

This action coming on to be heard at the May term, A. D. 1880, of said supreme court, at the supreme court-room in the city of Yankton,

Present, the chief justice and all the associate justices, and the appeal herein having been submitted upon printed briefs and arguments, McLaughlin and Steele, esq'r's, co'nsel for appellants, and Van Cise and Wilson, esq'r's, counsel for respondent, and the court having advised therein,

It is now here considered, ordered, and adjudged that the judgment of the said district court of said Lawrence County, appealed from herein, be, and the same is hereby, in all things affirmed.

54 And it is further ordered that this cause be, and it is hereby, remanded to the said district court with direction to proceed and carry out said judgment according to law.

It is further ordered and adjudged that the said respondent have and recover of and from said appellant his costs and disbursements in this behalf expended, taxed, and allowed at five and $\frac{45}{100}$ dollars.

Done in open court, this 18th day of May, A. D. 1880.

By the court.

PETER C. SHANNON,
Chief Justice Supreme Court D. T.

Associate justices Barnes, Kidder & Moody concurring. Shannon, chief justice, C. A. V.

To which ruling and decision of the court, as embodied in the foregoing judgment of reversal, the said defendant and appellant, Post, now here duly excepts, and at his request the exception is signed by direction of the court.

55, 56 Done in open court the 18th day of May, A. D. 1880.

By the court.

PETER C. SHANNON,
Chief Justice.

(Endorsement:) In supreme court, Dakota Territory. May term, 1880. John B. Pearson, respondent, vs. Morton E. Post et al. Order of court. Filed in open court this 18th day of May, A. D. 1880. B. S. Williams.

57 Know all men by these presents that we, Morton E. Post, of Cheyenne, in the Territory of Wyoming, and Newton Edmunds,

and James C. McVay, of the city of Yankton, in the Territory of Dakota, are held and firmly bound unto John B. Pearson, of Lawrence County, Dakota Territory, in the full and just sum of ten thousand ($10,000.00) dollars, to be paid to the said John B. Pearson, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a session of the supreme court of the Territory of Dakota, in a suit depending in said court between John B. Pearson and Alvin W. Whitney and Morton E. Post, partners, doing business under the firm name of the Keets Mining Company, and judgment was rendered against the said Morton E. Post, and the said Morton E. Post having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John B. Pearson citing and admonishing
58
to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said Morton E. Post shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue,

MORTON E. POST. [SEAL.]
JAMES C. McVAY. [SEAL.]
NEWTON EDMUNDS. [SEAL.]

In presence of—
J. R. GAMBLE.
R. J. GAMBLE.

TERRITORY OF DAKOTA,
Yankton County, *ss:*

On this 16th day of July, in the year one thousand eight hundred and eighty, before me, the subscriber, clerk of the supreme court of said Territory, appeared Newton Edmunds & James C. McVay, to me personally known to be the same persons described in and who executed the above bond, and each acknowledged that they executed the same.

[SEAL.] B. S. WILLIAMS,
Clerk Sup. Court.

59 TERRITORY OF DAKOTA,
County of Yankton, *ss:*

Newton Edmunds and James C. McVay being severally sworn, each for himself says: The said Newton Edmunds says he is a resident & freeholder of the county of Yankton, in this Territory, and that he is worth in property not exempt from execution the sum of $10,000.00 over and above all debts and responsibilities which he owes or has incurred; and the said James C. McVay, for himself, says that he is a resident & freeholder of the county of Yankton, in this Territory, and that he is worth in property not exempt from execution the sum of $10,000.00 over and above all debts and responsibilities which he owes or has incurred.

NEWTON EDMUNDS.
JAMES McVAY.

Subscribed and sworn to before me this 16th day of July, 1880.

[SEAL.] B. S. WILLIAMS,
Clerk Supreme Court, D. T.

I certify that I find the sureties in the foregoing bond sufficient, and do approve and allow the same.

PETER C. SHANNON,
Chief Justice.

60 (Endorsement:) Territory of Dakota. In supreme court. John B. Pearson, defendant in error, vs. Morton E. Post, plaintiff in error. Bond. Filed in my office this 16th day of July, 1880. B. S. Williams, clerk.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Dakota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between John B. Pearson, plaintiff, and Morton E. Post, defendant and appellant, in an action entitled John B. Pearson, plaintiff, against Alvin W. Whitney and Morton E. Post, copartners, doing business under the firm name and style of the Keets Mining Company, defendants, a manifest error hath happened, to the great damage of the said defendant Morton E. Post, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and
62 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 16th day of July, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] BENJAMIN S. WILLIAMS,
Clerk of the Supreme Court of Dakota Territory.

Allowed by me.

P. C. SHANNON,
Chief Justice of Supreme Court of Dakota.

JULY 16, 1880.

63 UNITED STATES OF AMERICA,
Territory of Dakota, ss:

I, Benjamin S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that a true copy of the within and foregoing writ of error was lodged in my office on the 16th day of July, A. D. 1880.

[SEAL.] B. S. WILLIAMS, *Clerk.*

(Indorsed :) Territory of Dakota. In supreme court. John B. Pearson, defendant in error, vs. Martin E. Post, plaintiff in error. Writ of error. Filed in my office this 16th day of July, 1880. B. S. Williams, clerk.

64 The United States of America to John B. Pearson, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Morton E. Post is plaintiff in error and you are defendant in error, in an action brought by you, the said John B. Pearson, against Alvin W. Whitney and Morton E. Post, partners doing business under the firm-name of the Keets' Mining Company, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Peter C. Shannon, chief justice of the supreme court of the Territory of Dakota, this 16th day of July, in the year of our Lord one thousand eight hundred and eighty.

P. C. SHANNON,
Chief Justice of Supreme Court of Dakota.

65 (Indorsed :) Territory of Dakota, in the supreme court. John B. Pearson, defendant in error, vs. Morton E. Post, plaintiff in error. Citation.

Service of a true copy of the original citation on us this 22' day of July, 1880, acknowledged.

VAN CISE & WILSON,
ALBERT ALLEN,
Att'ys for Respondent and Deft. in Error.

Filed in my office this 15' day of August, A. D. 1880. B. S. Williams, clerk.

66 In the Supreme Court of the United States.

MORTON E. POST, IMPLEADED AS A DEFENDANT with Alvin W. Whitney, appellant and plaintiff in error,
vs
JOHN B. PEARSON, DEFENDANT IN ERROR.

Assignment of errors.

And the said appellant and plaintiff in error, Morton E. Post, says there is manifest error on the face of the record in the above-entitled action in this, to wit:

I. That the court erred in admitting parol testimony to explain the written contract of July 16th, 1877, between John B. Pearson and A. W. Whitney, in this, that such testimony tended to show that the contract was made for and on behalf of the Keets Mining Company, by A. W. Whitney, while the contract itself shows it was made by and between said Pearson and said Whitney.

II. That the court erred in admitting parol testimony to vary and contradict the written contract of July 16th, 1877, between Pearson and Whitney, in this, that such testimony tended to show that the contract was not the contract of Pearson and Whitney, but of Pearson and 67 Keets Mining Company, an association or copartnership composed of Whitney and Post.

III. That the court erred in refusing to non-suit the plaintiff, as requested by the defendant Post, upon the production of the judgment on demurrer in this case, rendered by the court March 7th, 1878, in favor of said defendant Post and against the plaintiff.

IV. That the court erred in refusing to instruct the jury that the judgment on demurrer theretofore rendered in said action was a bar to a recovery against the defendant Post, and that the jury should find for said defendant.

Therefore the plaintiff in error, the said Morton E. Post, prays that the said judgment of the said supreme court of the Territory of Dakota and of said district court may be reversed, and that speedy justice may be done in the premises.

McLAUGHLIN & STEELE,
GAMBLE BROTHERS,
Attorneys for Morton E. Post, Plaintiff in Error.

68 (Indorsed:) In the Supreme Court of the United States. Morton E. Post, impleaded as a defendant, with Alvin W. Whitney, appellant and plaintiff in error, vs. John B. Pearson, defendant in error. Assignment of errors. Filed in my office this 15th day of August, A. D. 1880. B. S. Williams, clerk.

69 TERRITORY OF DAKOTA, *ss:*

In supreme court.

JOHN B. PEARSON, RESPONDENT,
vs.
MORTON E. POST, IMPLEADED WITH ALVIN W. Whitney, appellant.

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, certify that I have carefully compared the foregoing copy with the original record on file in this office in the above-entitled cause, and that the same is a true and complete copy of all the papers on file and from the journal proceedings had in this cause, and that they are true and correct copies of such journal entries, together with the writ of error issued herein.

In testimony whereof I hereunto set my hand and affix the seal of the said supreme court this 15th day of September, A. D. 1880.

[SEAL.] BENJAMIN S. WILLIAMS, *Clerk.*

(Indorsement on cover:) No. 294. Morton E. Post, plaintiff in error, vs. John B. Pearson, Dakota Territory supreme court. Filed 30th September, 1880.

108-418

McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 294.

MORTON E. POST, Plaintiff in Error,

vs.

JOHN B. PEARSON.

In Error to the Supreme Court of the Territory of Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

R. T. Merrick,
M. F. Morris,
For Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 294.

MORTON E. POST, Plaintiff in Error,

vs.

JOHN B. PEARSON.

In Error to the Supreme Court of the Territory of Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

On July 16, 1877, John B. Pearson, the defendant in error, entered into a contract in writing under seal, a copy of which is found on page 8 of the record, with one Alvin W. Whitney, who describes himself in it as "superintendent of the Keets Mining Company," whereby Whitney was to deliver at Pearson's mill, and Pearson was to crush, a certain number of tons of ore each day for ninety days between certain specified dates. And it was provided that the contract might be terminated by Whitney at any time upon ten days' notice in the event of the ore from the "Keets Mine" running short.

Whitney terminated, or assumed to terminate, the contract before the termination of the ninety days, on the pretense that the contingency had occurred in which the right had been reserved to terminate it.

Thereupon Pearson instituted suit upon the breach of the contract not only against Whitney, but against Post also, the plaintiff in error, on the charge that Whitney and Post were partners under the name of "The Keets Mining Company," and that Whitney, although in fact holding the position of superintendent of the company, had entered into the contract for Post and himself as partners.

With his complaint Pearson set forth the written contract. Whitney filed a general denial; Post demurred, and his demurrer was sustained. Pearson thereupon amended his complaint, and declared upon a contract generally, without setting forth whether the same was in writing or not. Post answered with a general denial.

Upon the trial of the case Pearson offered the written contract already mentioned in evidence, and claimed no other. Proof was then offered of the partnership between Whitney and Post under the name of the "Keets Mining Company," and that both Whitney and Pearson understood that the contract had been made for the benefit of the company, and not for the individual benefit of Whitney, and that Post had received a portion of the proceeds ~~profits~~ of the contract.

Post objected to all this testimony, but his objection was overruled. He then introduced the record of the judgment on ~~no~~ his demurrer to the first complaint as an estoppel. This also was overruled.

The supreme court of the Territory sustained the district court in its rulings, and judgment having been rendered against Post, he brings the case here on writ of error.

II.

ASSIGNMENT OF ERRORS.

The errors claimed to have been committed by the Territorial courts are the following:

1. There was error in the admission in evidence against Post of the contract in writing under seal purporting to

have been executed by Whitney alone, and neither for nor on behalf of Post, nor for nor on behalf of the Keet's Mining Company.

2. There was error in the admission of testimony to vary and explain that written contract.

3. There was error in the refusal of the court to give effect to the judgment on the demurrer as a bar to further proceedings against Post.

III.

BRIEF OF ARGUMENT.

A.

The first and second assignment of error may be taken together. They raise the question whether a person may be charged with liability upon a contract in writing under seal, to which he is not a party and which he is not shown to have in any manner whatever authorized.

There is no proof anywhere in the record that Post either authorized the execution of the written contract introduced into the case, or subsequently ratified it. The proof is merely that he was a member of a partnership known as the "Keet's Mining Company;" that as such member he received a portion of the proceeds of the contract, knowing whence they came; that Whitney, who made the contract, was "superintendent of the Keet's Mining Company;" and that the contract was understood by both Whitney and Pearson to have been made for the benefit of the company, and not for the individual benefit of Whitney. (Record, p. 11.)

The liability of Post can be sustained only upon proof that Whitney, in the execution of the contract, was authorized to bind him. We have seen that there is no proof of such authority; and even if there were such proof, and the

Thereupon Pearson instituted suit upon the breach of the contract not only against Whitney, but against Post also, the plaintiff in error, on the charge that Whitney and Post were partners under the name of "The Keets Mining Company," and that Whitney, although in fact holding the position of superintendent of the company, had entered into the contract for Post and himself as partners.

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The liability of Post can be sustained only upon proof that Whitney, in the execution of the contract, was authorized to bind him. We have seen that there is no proof of such authority; and even if there were such proof, and the authority were fully proved, the instrument itself is inadmissible in evidence, because it is not executed in such manner as to bind the principal. Mr. Justice Story, in his Treatise on Agency, lays down the law upon this subject, as follows:

> "In order to bind the principal and to make it his contract, the instrument must *purport on its face* to be the contract of the principal; and his name must be inserted in it and signed to it, and not merely the name of the agent, even though the latter be described as the agent in the instrument; or at least the terms of the instrument should clearly show that the principal is intended to be positively bound thereby, and that the agent acts plainly as his agent in executing it."

Story on Agency, Sec. 148.
Story on Contracts, Sec. 222.
Stackpole *vs.* Arnold, 11 Mass., 27, 29.
Bedford, &c., *vs.* Covell, 8 Metcalfe, 442.

In the case of Stackpole *vs.* Arnold, 11 Mass., 27, it is said: "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has been long settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature. It is also held, that, whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person."

Nor does it make any difference that the person signing the contract signs as "agent," or with any other *descriptio personæ*, it is still his own contract, and not that of a principal whom he may have intended to bind. This is held universally by all the authorities.

Stone *vs.* Wood, 7 Cowen, 453.
Bank *vs.* Monteith, 1 Denio, 402.
Seaver *vs.* Coburn, 10 Cush., 324.
Jones *vs.* Littledale, 6 A. & E., 486.
Magee *vs.* Atkinson, 2 M. & W., 440.
Higgins *vs.* Senior, 8 M. & W., 834.
Appleton *vs.* Binks, 5 East, 148.
Duvall *vs.* Craig, 2 Wheaton, 56.
Tippets *vs.* Walker, 4 Mass., 595.
Forster *vs.* Fuller, 6 Mass., 58.
White *vs.* Skinner, 13 Johns., 307.
Elwell *vs.* Shaw, 16 Mass., 42.
1 Amer. Leading Cases, p —, and cases cited in notes.
Smith *vs.* Morse, 6 Wallace, 76, 83.

In the case of Nash *vs.* Towne, (5 Wallace, 689, 703,) a distinction is taken between simple contracts and contracts under seal; and it is held that only in the former is it allowed to introduce oral evidence to show that the contracting party named in the contract is the agent of an undisclosed principal.

2.

It does not alter the case that Whitney and Post were partners, and that Whitney acted on behalf of the partnership known as "The Keets Mining Company," composed of himself and Post. (Record, p. 11.)

It is well-settled law that one partner cannot bind his copartnership by an instrument of writing under seal, except possibly in the case where the other partner or partners are present at the execution of the instrument, and assent to it; and no such presence or assent is shown here.

3.

Reliance seems to be placed upon the fact that Post, as a member of the partnership, received a "portion of the proceeds of the contract, knowing whence it came;" and this, it is presumed, will be claimed as an adoption and ratification of the contract. (Record, p. 11.)

If to retake or to receive back one's own specific property, after an unauthorized contract by an unauthorized agent has been expended upon it, be a ratification of such unauthorized contract, then, perhaps, there was ratification in this case. But the proposition is at variance with the best established rules of agency and the principles that govern the rights of property. "The portion of the proceeds of the contract" which Post received as a member of the partnership is simply the same mineral ore that came out of the mine that belonged jointly to him and his partner. Assuredly something more than this is required to show ratification of an unauthorized contract.

B.

The second ground of complaint on behalf of the plaintiff in error is, that the matter in controversy between him and the defendant in error had been adjudicated in the Territorial district court by the decision upon the demurrer interposed by Post to Pearson's first complaint (Record, pp. 9, 10); that this demurrer went to the merits of the case; and that the judgment upon it should have been allowed as a bar to further proceedings upon the trial of the issue raised by the amended complaint.

It will be noticed that the amended complaint (Record, pp. 2, 3) except in its verbiage, does not differ substantially from the original complaint (Record, p. 7–9,) except that the latter declares upon a contract in writing specifically set forth as part of the complaint, and the former declares upon a contract generally, of the same date as the written contract, but without specification as to whether it was in writing or not.

The demurrer to the original complaint set forth two grounds of objection—one technical, "misjoinder of parties" (which under the Territorial code is untenable as a ground of demurrer,) and the other to the merits, that the case set forth and the contract sued out showed no cause of action against the plaintiff in error. Upon this ground the demurrer was sustained; and the defendant in error acquiesced in the decision, and amended his declaration or complaint.

The amended complaint did set forth a good cause of action. It alleged a contract between the plaintiff Pearson and the defendants Whitney and Post; and it was not open to demurrer, or even to a plea of *res adjudicata*. For it did not appear from the amended complaint that the contract there sued on was the same contract that had been set forth in the original complaint. And not until the same written contract was offered in evidence under the amended complaint could the plaintiff in error avail himself of the objection that it had already been decided that this contract could give no ground of action against the plaintiff in error.

It matters not now whether the demurrer was good or bad, or whether the judgment upon it was right or wrong. There *was* judgment upon it; and the plaintiff in the suit acquiesced in that judgment; and the judgment became final. And the question now is, whether that judgment is not a bar to any further proceedings intended to enforce the contract involved in it. The claim of the plaintiff in error is that the court below erred in refusing to rule out that contract and to give effect to the judgment on the demurrer as a bar to the suit, supported as the suit was merely by the contract in question.

That a decision upon demurrer, if it involves the merits of the case, is just as final as any other decision, is beyond question.

It is also true that "a decision given in the progress of a case, whether right or wrong, is the law of the case in which it is given and binding upon the parties."

Rector *vs.* Darnley, 14 Ark., 304.
Cole *vs.* Clark, 3 Wisc, 323.
Deslonde *vs.* Darrington, 29 Ala., 92.
Thomas *vs.* Doub, 1 Md., 252.
Lucas *vs.* San Francisco, 28 Cal., 591.

There is no difference in principle between a decision on demurrer in the same case as *res adjudicata* for all subsequent proceeding, and a similar decision rendered in a different case. The demurrer, if sustained, disposes of the subject-matter; and the pleading demurred to drops entirely out of the case, if the party thereafter amends.

R. T. Merrick,
M. F. Morris,
For Plaintiff in Error.

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IN THE SUPREME COURT

OF THE UNITED STATES,

NO. 294.

MORTON E. POST, PLAINTIFF IN ERROR,

versus

JOHN B. PEARSON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF DAKOTA.

Brief of Counsel for Defendant in Error.

VANCISE & WILSON AND J. W. SMITH,
For Defendant in Error.

DEADWOOD, DAKOTA,
THE TIMES PUBLISHING HOUSE,
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McLAUGHLIN & STEELE AND R. T. MERRICK,
ATTORNEYS FOR PLAINTIFF IN ERROR

VAN CISE & WILSON AND J. W. SMITH,
ATTORNEYS FOR DEFENDANT IN ERROR.

Brief of Counsel for Defendant in Error.

There were two points urged by counsel as error in the Court whence this case comes. Stated in the order of importance there given them by counsel, they were. (1.) The refusal of the trial Court to instruct the jury that the ruling on demurrer (called a judgment by counsel) was a bar to any recovery by Pearson against Post; and (2) The admission of parol testimony by the trial Court to show what persons constituted the Keets Mining Company, mentioned in a written contract introduced in evidence, and which was construed by the Court to be a contract between John B. Pearson on one part, and Alvin W. Whitney and Morton E. Post, co-partners doing business under the firm name and style of the Keets Mining Company, on the other.

I.

This action was brought by Pearson against Whitney and Post, constituting the Keets Mining Company, for damages for breach of contract. The original complaint declared upon the written contract, attaching it as an exhibit, as follows, (page 8 of Record):

Memorandum of an agreement made and entered into this 16th day of July, 1877, at Central City, Dakota, by and between A. W. Whitney, superintendent of the Keets Mining Company, parties of the first part, and J. B. Pearson, party of the second part, witnesseth:

I. That said parties of the first part, in consideration of the premises hereinafter mentioned, and subject to the conditions hereinafter stated, hereby jointly and severally undertakes, promises, and agree to deliver at the mill of the said party of the second part at Central City, on Deadwood Gulch, in the county of Lawrence and Territory of Dakota, gold-bearing ore from the vein, lode, or deposit of mineral-bearing ore on the south side of Hidden Treasure Gulch, in the County and Territory aforesaid, and known as the "Keets Mine," for the purpose of being crushed and milled and the gold extracted therefrom; said ore is to be delivered at said mill in quantities sufficient from time to time by said parties of the first part to constantly supply the working capacity of the twenty-stamp mill of the said party of the second now being run at Central City, and which capacity is about thirty (30) tons daily.

II. The said party of the second part, in consideration of the delivery to him at his quartz mill at Central City aforesaid, of gold-bearing ore from the said "Keets mine," do hereby undertake, promise, and agree, jointly and severally, to run said mill constantly upon said ore while there shall be any at said quartz mill, and not delay the crushing and milling thereof by running upon any other ores for a term of (90) ninety days, commencing on the 16th day of July, A. D. 1877, and closing on the 13th day of October, A. D. 1877. It is expressly understood that the parties of the first are to have the entire use of said twenty stamps, as specified in the foregoing.

III. The said parties of the first part hereby undertakes, promises, and agree to pay the said party of the second part for the crushing and milling said ore the sum of ($9.00) nine dollars per ton for each and every ton crushed and milled, in the currency of the United States, or in gold dust, retort, or bullion, at such rates as will make the sum equivalent to said currency, payment to be made after each clean up.

IV. It is further understood and agreed upon that said parties of the first part shall have access to said mill at any time during the contract, for the purpose of examining and inspecting the working of said mill, and may be present in person or by agent at any and all clean-ups and assist thereat, at their own cost and expense.

V. It is further understood and agreed upon that no publicity shall be given of the yield of said ore by the party of the second part, nor of the amount of ore so milled from said mine.

VI. It is further understood and agreed upon that if at any time the ore from said mine shall not pay the cost of mining and milling, or in case of the mine failing to produce, then the said parties of the first part, after reasonable notice, may terminate this contract, such reasonable notice to be given at such time as will enable the party of the second part to get other ores to run his mill, that is, ten (10) days notice.

Witness our hands and seals the day and year first above written.

A. W. WHITNEY, [SEAL.]
Witness. Sup't Keets Mining Co. [SEAL.]
JOHN B. PEARSON. [SEAL.]

To the complaint as thus drawn, the defendant, Post (here plaintiff in error) separately demurred, alleging misjoinder of parties, and insufficient facts stated to constitute a cause of action against him. The point urged was, that the contract upon its face was Whitney's own, and not the Keets Mining Company's. The then presiding Judge of the trial Court, after argument, took the compromise view suggested by Mr. Parsons (Parsons on Contracts, 6th Ed. p. 55, note) and deduced from the language of the

Court in the case of Fenley vs. Stewart (5 Sandf. 101) –"Where a contract is reduced to writing, and an action is brought upon the writing itself, no other persons can be made parties than those named in the instrument; but when a right of action exists independent of the writing, which is merely offered as evidence, tending among other things to establish that right, then the party having the legal interest or liability, and for whom the contract was actually made, may sue or be sued, although not named in the writing"—and sustained the demurrer of Post, but with leave to the complainant to amend his complaint. The court seems to have adopted the theory that to maintain an action upon the contract against Post it was necessary his name should appear in it, overlooking the fact that the principal was the Keets Mining Company, and that it was named and referred to many times in the contract, and that a right of action against it included a right of action against the persons composing the company, it being a mere co-partnership. The order of the Court in this instance, and all there was of it, was simply—(page 10 of Record):

"Now on this 7th day of March, 1878, this cause coming on for hearing before the Court, upon the demurrer of the defendant Post to the complaint of plaintiff herein, and which demurrer was heretofore filed herein,—after argument of counsel thereon, and the Court being fully satisfied in the premises, it is now here ordered and considered by the Court, that the said demurrer of the defendant Post be and the same is hereby sustained; and leave is given to the plaintiff to amend his said complaint, and to serve a copy thereof on defendants within thirty days from this time."

The complainant proceeded, under this order, and within the time given therein, to serve an amended complaint upon both defendants as permitted by the order. It was in, substantially, the form of the original, declaring at length upon contract and alleging the breach and damages, but omitting the written agreement or any reference to it as in writing. To this amended complaint Whitney and Post answered separately, Whitney by an admission of the contract, but denial of the breach, and Post by a general denial in this form:

"The defendant, Morton E. Post, separately answering the amended complaint of the plaintiff herein denies each and every allegation therein contained."

Thus stood the pleadings at the time of the trial. The stipulation of counsel (p. 10-13 of Transcript of Record) brings up the evidence, and shows that every allegation of the complaint was sustained: (1) That Whitney and Post, during the term of the contract were the owners of the Keets mine, and co-partners doing business under the firm name and style of the Keets Mining Company; (2) that during that time they were engaged in working that mine, and having the ore therefrom milled; (3) that Whitney during all that time was the superintendent of the Keets Mining Company; (4) that on the 16th day of July, 1877, the contract in controversy was made, and that Whitney in making it acted for and in behalf of the Keets Mining Company, and the contract was made for its use and benefit, and that Pearson and Whitney both so understood it, and it was not made or intended as the individual contract of Whitney; (5) that Post was a member at that time of the Keets Mining Company, and continued to be during the term of this contract, and as a member of the Company received a large portion of the proceeds of the contract, knowing whence it came. It was further proven (stipulation as to evidence par. 6) that the balance due on milling account under the contract was $4,714.50, that the damages for failure to keep the mill supplied at one time (7) were $500, at another (13) $540, at another (13) $2,800, and a further damage suffered (13) of $2,625, making a total which plaintiff was entitled to recover on the proofs of $10,679.50. The jury's verdict was only $7,500.

It is further admitted by paragraph 16 of the stipulation (p. 12 of Transcript of Record) that plaintiff introduced the written contract without objection, and then proved by parol testimony that Post was an owner in the Keets mine, and a member of the Keets Mining Company. This proof was offered by plaintiff, not for the purpose of explaining, varying or contradicting the contract, but for the purpose of ascertaining who were the real parties to it, and to show that Post was one of the real parties in interest therein, and a participant in the results of the contract, and for the purpose of charging him upon it, and that Whitney acted and was acting merely as the agent of himself and Post as principals. To this, counsel for Post objected on the ground that it tended to explain, vary and contradict the written contract. The objection was overruled, the evidence admitted, and an exception taken. This evidence disclosed the facts stipulated in paragraphs Nos. 1, 2, 3, 4 and 5, page 11 of Record just cited. Then counsel for Post, who were also counsel for Whitney, and had answered for each, but without pleading on behalf of Post the ruling on demurrer as a bar, offered it in evidence and asked thereon that as to Post, the complainant be nonsuited. This th Court declining to do, unless Post would rest his case, and th latter refusing to do this, the request was denied upon tha ground, and after evidence and further consideration, the application was renewed in another form, counsel requesting the Cour to charge the jury that the ruling on demurrer was a bar in favo of Post, and that no recovery could therefore be had against him This, too, was refused. Counsel for Post excepted to the ruling o the motion to nonsuit and also the refusal to instruct the jury a requested. This, in the Supreme Court of Dakota Territory was urged as the principal error, and in the decision of tha Court is first considered. We treat it in that order here.

Although counsel have strangely insisted on calling this ruling on demurrer a judgment, it will be seen that it was not; tha it was simply an order sustaining the demurrer, with leave t complainant to amend. Even had there been an interlocutory judgment, in those States where such practice exists, it would no have been a bar.

As long as the action continues to be pending in the sam Court, the judgment upon a demurrer to a declaration, cannot b considered as absolutely and conclusively final; for in the exercis of judicial discretion, any question of law upon which an opinio has been expressed may be reopened for further examination.

Calder et al. vs. Haynes, 7 Allen, 387.

A judgment rendered upon the insufficiency of the declaration and not upon the merits of the case is no bar

Wilbur vs. Gilmore, 21 Pick., 256.
Jordan vs. Siefert, 126 Mass., 25.

But this was in no sense a judgment. Counsel took no judgment for dismissal for Post The order gave permission t amend and serve defendants. This was done. Each defendant answered. The case continued in Court. Counsel was bound t know it was the same case. The decision was not therefore final, and could only have been made so, by a judgment in Post's favor on the ruling, on a failure to amend.

Only those decisions of trials amounting to final determination of the rights of the parties, answer to the definition given of a judgment. Hence it is obvious that an order overruling a demurrer, but giving the defendant an opportunity to answer, is not a judgment within the meaning of the code.

Freeman on Judgments, section 15.

There is no such thing permissible as an interlocutory judgment in any cause. The judgment the code provides for is a final determination of the rights of the parties to the action.

Belmont vs. Ponvert, 3 Robertson, N. Y. Super. Ct., 693, 698 note.

Merely overruling a demurrer does not, in and of itself, give the other party a judgment, nor is an order thereupon that he have judgment, a part of the judgment which he may have.

Garner vs. Harmony Mills, 6 Abbott's New Cases, 212.

A judgment is the final determination of the rights of the parties in the action.

Dakota Code of Civil Procedure. Sec 228.

No judgment is final which does not terminate the litigation between the parties to the suit.

St. Claire Co. vs. Livingstone, 18 Wallace, 628.

In no sense was this ruling on the demurrer a bar. It was not a judgment. It was not final. Plaintiff could not have appealed from it.

From a mere interlocutory order no appeal lies.

Cruger vs. Douglas, 2 New York, 571.

Coleman vs. Dixon, 50 New York, 572.

An appeal to the Court of Appeals, from an order sustaining or overruling a demurrer is not permitted by the code, but final judgment must first be given on the demurrer.

Ferris vs. Aspinwall, 10 Abbott, N. S. 137.

Adams vs. Fox, 27 New York, 640.

The Supreme Court of Dakota had previously decided its province to be to hear and determine writs of error and appeals from final decisions of the District Courts in all cases; not from interlocutory orders or decisions, not from orders made, or decisions pronounced during the progress of the cause, but from final decisions or, what is the equivalent term when applied to an action, from final judgments.

Harris Manf'g Co. vs. Walsh, 2 Dak., 35, 3 N. W. Rep., 307.

Had judgment on the amended pleadings gone against Pearson and this been his appeal, he could not have urged this ruling as error, because amending waived it. Had the ruling on demurrer been adverse to Post, and he then answered, he would have been in the same position. We suppose the authorities are uniform on this question. Was not answering the new complaint, without a plea in bar, a waiver of Post's exceptions to the ruling except in so far as the question could again be raised on objection to evidence?

Counsel offers as an excuse for not pleading the ruling in bar that Post had no right to presume, and did not presume, that the cause of action in the amended complaint was identical with the one set out in the original complaint. What else could he presume? The filing of the new complaint after a demurrer has been sustained is not the commencement of a new action.

Jones vs. Hewlett et al., 28 Cal., 246.
Barber vs. Reynolds, 33 Cal, 501.
McFadden vs. Ellsworth, M. & M. Co., 8 Nev., 60.

This contract was not of the class required to be in writing by the statute of frauds. It would have been good if in parol. Hence, under the rule of Fenley vs. Stewart, even if the Keets Mining Company had not been named at all in the contract "a right of action existed independent of the writing which could be offered in evidence, tending among other things to establish that right, and the party having the legal interest or liability, and for whom the contract was actually made, could sue or be sued although not named in the writing."

But suppose the ruling upon the demurrer was error, as we think it was, was it not perfectly competent for the Court to reverse it? Could not the then Judge have admitted the contract in evidence, despite his ruling on the demurrer? Did not his giving leave to amend, indicate this to be his purpose? If he could, why not his successor?

It is competent for the Court at any time before the final decree has been signed, to reconsider and modify or set aside any of the interlocutory rulings or orders made in the course of the proceeding.

Clark vs. Blair, 14 Federal Reporter 813.

And this brings us to what we consider the main and only question in this case.

II.

Was the contract proven in this action, the contract of the Keets Mining Company or of A. W. Whitney only? The parol testimony showed conclusively that it was the contract of the Company and the Court very properly construed the written agreement as the contract of the Company. The oral contract proven, showing the partnership, the authority of Whitney to bind it, the ratification by Mr. Post of this particular agreement, and his share in the profits, was ample to sustain the verdict, unless the writing would conclude Pearson, and show that he gave sole credit to Whitney, and intended that only he should be bound. This, no rational mind would contend. There was no parol testimony then in conflict with it, none that even supplemented it, except the mere explanation that the Keets Mining Company was a copartnership, consisting of Alvin W. Whitney and Morton E. Post, and Whitney was Superintendent, and this was clearly competent.

A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.

Civil Code of Dakota, Section 938.

Parol evidence is admissible to identify particular persons or things mentioned in a written instrument.

2 Phillips on Evidence, 711.
Snydor et al. vs. Palmer et al., 29 Wis. 226.
Knight vs. Worsted Co., 2 Cushing 271.
Stoops vs. Smith, 100 Mass. 63.

Suppose the name of the Keets Mining Company had not even appeared in this instrument at all, and it had appeared upon its face as a contract of Pearson and Whitney, the tendency of decisions is strongly to admit parol testimony to bind the unnamed principal.

Parol evidence may always be admitted to charge an unnamed principal, but not to discharge the actual signer.

Note to Thompson vs. Davenport, 2 Smith's Leading Cases, 365, 369

It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals.

Higgins vs. Senior, 8 Meeson & Welsby 843.

There is no question that a contract in writing by an agent signed by himself will bind his principal when the other contracting party discovers the principal, although the contract was made without his knowing who the principal is.

Beckham vs. Drake, 9 Meeson & Welsby 79.

The rights and liabilities of a principal upon a written instrument executed by his agent, do not depend upon the fact of his agency appearing on the face of the instrument itself, but upon the facts, first that the act is done in the exercise, and second within the limits of the power delegated; and these are necessarily inquirable into by evidence.

Huntingdon vs. Knox, 7 Cushing 371.

It must now be deemed the settled law of this Court, and supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity.

Briggs et al., vs. Partridge et al., 64 New York, 357, 362.

If the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, the agent will be liable to be sued and be entitled to sue thereon, and his principal will also be liable to be sued and entitled to sue thereon, in all cases, unless from the attendant circumstances, it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it.

Story on Agency, Section 160, (a).

Counsel contend that this rule can not be applied to sealed instruments. In the case of Beckham vs. Drake, cited, no distinction was recognized. Judge Story intimates a different view in the extract quoted, and counsel for Post rely upon it here, inasmuch as the contract sued on is under seal. But the instrument did not require to be sealed, would have been valid without it, hence is to be treated as the written evidence of a simple contract, and the seal adds nothing to it.

Evans vs. Wells, 22 Wendell, 325.
Stowell et al. vs. Eldred,, 39 Wis., 625.
Gibson v Warden 14 Wall 244

The doctrine as applicable to partners, is now firmly established, that whenever an act done by a partner within the scope of the partnership business, would be valid if done by an unsealed instrument, then, although done by an instrument under seal, it will be valid and bind his copartners, if it is authorized by a prior parol authority, or adopted by a subsequent parol ratification.

Worrall vs. Munn and Prall, 5 New York, 229, 240.

And as generally sustaining the doctrine that where an instrument not required to be under seal, was so executed, it may be enforced as a simple contract, see

Lawrence vs. Taylor, 5 Hill 113.
Skinner vs. Dayton, 19 Johns. 554, 558.
Randall vs. Van Vechten, 19 Johns. 60.
Damon vs. Granby, 2 Pickering 352.
Bank of Columbia vs. Patterson, 7 Cranch 299, 304.

But this distinction is unimportant in view of the fact that in Dakota Territory all distinctions between sealed and unsealed instruments are abolished (Civil Code of Dakota, Section 925.)

Or, as suggested in the opinion of the Dakota Supreme Court, the seal might be treated as the seal of the Keets Mining Company, named in the body of the contract and the signature.

But counsel contend, that "the terms of the instrument should clearly show that the principal is intended to be bound thereby, and that the agent acts plainly as his agent in executing it." This is no stronger statement of the doctrine than our Code makes: "Any instrument, within the scope of his authority by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself." (Civil Code of Dakota, Sec. 1373.)

But this, it will be found, on an examination of the cases, is not a limitation of the doctrine cited from Story and declared to be the settled law of New York State in the opinion of Justice Andrews, (Briggs et al. vs. Partridge et al., 64 N. Y., at p 362) except when applied to negotiable instruments and contracts under seal, in those States where a strict distinction is still observed between sealed and unsealed instruments. But the contract in this case, even had it been the necessary basis of the action, and not merely evidence in support of the right to recover, exhibits more clearly the intent to bind the principal than the majority of the cases in the books. Let us see.

In this instrument, the Keets Mining Company was named in the body of the contract and in the signature. The contract upon its face was between A. W. Whitney, superintendent of the Keets Mining Company, PARTIES of the first part, and J. B. Pearson, party of the second part. The PARTIES of the first part agree to deliver the ore from the Keets mine, (the property of the Keets Mining Company) to Pearson's mill. The PARTIES of the first part are to have the entire use of 20 stamps of his mill for 90 days. The PARTIES of the first part are to have access to his mill for certain purposes, either in person or by agent, and may assist at all clean-ups at THEIR own cost and expense. The PARTIES of the first part, may by notice terminate the contract. The contract is signed "A. W. Whitney, superintendent Keets Mining Company."

Babcock et al. vs. Beman, 11 New York, 200, was a case of promissory note payable to R. Beman, Treas., and he being the treasurer of a corporation, with authority as such to receive and transfer the note, indorsed it "R. Beman, Treas." and delivered it to plaintiffs; held, in an action against Beman, as indorser, that he was not individually liable.

Bank of Genesee vs. Patchin Bank (19 N. Y. 312) was a case where the defendant was held liable on a bill endorsed "S. B. Stokes, Cas.," parol proof being admitted to show that he was defendant's cashier and that defendant received the proceeds.

In Randall vs. Van Vechten et al. (19 Johns 60) the defendants contracted in their own names as a committee appointed by the honorable the corporation of the City of Albany, appointed for that purpose, signed their names and affixed their individual seals. It was held that the defendants were not liable.

In Dubois vs. The Delaware & Hudson Canal Company, (4 Wend., 285) the contract was signed "Maurice Wurts, agent for the Delaware and Hudson Canal Company," and the defendant was held liable.

In Hicks vs. Hinde et al., (9 Barb., 528) Hinde made his draft, adding to his signature, "agent." Parol evidence was admitted, and it was held he was not liable.

Many vs. The Beekman Iron Co. et al., (9 Paige, 188) was an action upon contract, reciting "We hereby agree to sell," and signed by Conklin and Hewett as agents for the Beekman Iron Company. The chancellor, on demurrer to the bill, held the instrument to be the contract of the Company.

Hood et al vs. Hollenbeck et at., (7 Hun,, 362) was an action on promissory note, signed by defendants, adding the words "Trustees of St. John's Ev. Lutheran Church, Hudson, N. Y." In the body of the note was "we promise to pay." Parol evidence was admitted, and the defendants signing as makers were discharged from individual liability.

Hill vs. Miller, (76 N. Y., 32) was an action on contract of sale, signed, "Thos. Mills, ag't. for P. R. Miller." Parol evidence was admitted and Miller was held.

Mann vs. Chandler, (9 Mass. 335) was an action on promissory notes. The defendant promised as, "I, the subscriber, treasurer," etc. and signed "Gardner L. Chandler, treasurer," etc. Facts aliunde were admitted, and defendant had judgment.

Long vs. Colburn, (11. Mass., 97) was an an action on promissory note signed, "pro William Gill—J. S. Colburn." Defendant made default, but plaintiff was non-suited.

Emerson et al., vs. Providence Hat Manf'g Co., (12 Mass. 237) was an action on promissory note reciting "I promise to pay," and signed, "For the Providence Hat Manufacturing Co., Frink Roberts." Parol evidence was admitted to show agency and authority, and the defendant was held.

The New England Marine Ins. Co., vs. DeWolf (8 Pick. 56) was an action on guaranty of promissory notes in the following form: "By authority from J. DeWolf, jr., I hereby guaranty the payment of this note. Isaac Clap." Parol evidence was admitted to show authority and assent of defendant to the guaranty. DeWolf was held.

Rice vs. Gove, (22 Pick. 158) was an action on promissory note in this form, "For value received we JOINTLY and SEVERALLY promise to pay," etc., signed, "Patten & Johnson for Ira Gove." Parol evidence was admitted to show authority, and Gove was held.

In Fuller et al. vs. Hooper et al., (3 Gray, 334) a bill of exchange stamped in the margin "Pompton Iron Works," and concluding, "which place to account of Pompton Iron Works, W. Burt, agt.," was held the bill of the Pompton Iron Works, if Burt was authorized agent.

So in Carpenter vs. Farnsworth (106 Mass. 561) a bank check having the words, "Aetna Mills," printed on the margin and signed "I. D. Farnsworth, treasurer," was held a check of the Aetna Mills and not of defendant.

Chapman vs. Foster et al., (119 Mass. 189) follows this decision on an instrument similar in form.

In Cutler vs Ashland (121 Mass. 588) a contract not under seal, purporting to be a "Specification for building a town way in Ashland," signed "Warren Morse, Willard Aldrich, Road Commissioners for Ashland, Mass.," was held the contract of the town.

And a case very much in point is Goodenough vs. Thayer, et al., (132 Mass. 152). The agreement here purported to be between Thayer & Lincoln, agents of the steamer Atrato on one part, and Goodenough on the other, and was signed, "Thayer & Lincoln, agents." The Court repudiate the doctrine of DESCRIPTIO PERSONARUM and declare it the contract of the steamer and her owners, and not of Thayer & Lincoln.

The following Massachusetts cases are also referred to as bearing on the subject:

Dawes vs. Jackson, 9 Mass., 490.
Ballou vs. Talbot, 16 Mass., 461.
Commercial Bank vs. French, 21 Pick., 486.
Jefts vs. York, 4 Cushing, 371.
Abbey vs. Chase, 6 Cushing, 54.
Lyon vs. Williams, 5 Gray, 557.

Draper et al. vs. M. S. H. Co 5 Allen, 338.
Barlow vs. Cong. Soc. in Lee, 8 Allen, 460.
Cowen vs. Klaus, 101 Mass. 454.

In the following cases, where it is held that an unnamed principal, being the real party in interest, may maintain the action, the subject of his liability is also considered:

Eastern R. R. Co. vs. Benedict, 5 Gray, 561.
Huntington vs. Knox, 7 Cushing, 371.
Hunter vs. Giddings, 97 Mass. 41.
L. & G. M. Co. vs. Russell, 112 Mass., 387.
Ruiz vs. Norton, 4 Cal., 355.
Brooks vs. Minturn, 1 Cal., 481.
Taintor vs. Pendergast. 3 Hill, 72.

In Baker et al. vs Chambles (4 Greene 428) a note reciting, "we the undersigned directors of School District No. 4, Montpelier Township, promise to pay," etc., and signed, "G. W. Baker, V. F. Nicholson, Solomon Lovell," was held the note of the District and not of the individuals signing. The Court said: "In deciding whether an apparent agent intends to bind himself or his principal, the presumption is that he intended to bind his principal, because the agent should not be personally bound unless that intention is expressed in the contract." This decision is approved in the following Iowa cases:

Harkins vs. Edwards & Turner, 1 Iowa, 426.
Lyons vs. Adamson, 7 Iowa, 509.
Harvey vs. Irvine, et al., 11 Iowa, 82.
Wheelock vs. Winslow, 15 Iowa, 464.
Davison et al. vs. The D. G. & C. Co., 24 Iowa, 419.
Lacy vs The Dubuque Lumber Co., 43 Iowa, 510.

In Sayre vs. Nichols, (7 California 535) a bill of exchange, headed with the name of a banking house, and when paid to be charged to that office, but signed by a party as agent, was held the obligation of the bank, and not of the agent. Mr. Justice Burnett in this case thus summarily dismisses the theory of DESCRIPTIO PERSONÆ: "The rule that the word agent, appended to the name of the agent, is merely a discription of the person, is not in my view sustained by common sense; and when a rule is not sustained by common sense, well understood and legitimately applied, it is certain to be wrong." The doctrine of this case is fully sustained in

Haskell vs. Cornish, 13 Cal., 45.
McDonald vs. B. R. & A. W. Co., 13 Cal., 220.
Shaver vs. Ocean Mining Co., 21 Cal., 46.
Hall vs. Crandall, 29 Cal., 568.
Love vs. S. N. L. W. & M. Co. et al., 32 Cal., 639.
Blanchard vs. Kaull, 40 Cal., 440.
Lander vs. Castro, 43 Cal., 497.

To the same effect in a case on a bill of exchange, parol evidence being admitted to show the agency:

Gillig, Mott & Co. vs. The L. B. R. Co., 2 Nevada, 214.

And see the following authorities:
Wharton on Agency, Secs. 296, 298, 409, 492, 729.
Lee et al. vs. M. E. Church of Ft. Edward, 52 Barb., 116.
Worrall vs. Munn et al., 5 New York, 229.
Nobleboro vs. Clark, 68 Maine, 87.
Purinton vs. The S. L. Ins., & Ann. Co., 72 Maine, 22.
Musser vs. Johnson, 42 Missouri, 74.
Means et al. vs. Swormstedt, 32 Indiana, 87.
Hovey vs. Magill, 2 Connecticut, 680.
1 Am. Lead. cases, 612, 628, and cases cited.

The doctrine is fully settled in our favor by the decisions of the Supreme Court of the United States. In Mechanics Bank vs. Bank of Columbia, (5 Wheaton, 326) the Mechanics Bank was held liable on a check headed, "Mechanics Bank of Alexandria," and signed "William Paton jr." Parol evidence was held admissible to show that Paton was cashier of the bank and authorized to draw the check.

The New Jersey Steam Navigation Co. vs. Merchants Bank (6 Howard 381) an action brought by an undisclosed principal, the Court fully sustained the doctrine of Higgins vs. Senior, (8 M. & W. 834, 844).

To the same effect is Ford vs. Williams and Williams, (21 Howard, 287) and the Court says: "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. Such evidence (says Baron Parke,) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal."

The ruling in this case is followed and the above language cited in support, in Baldwin vs. Bank of Newberry, (1 Wallace, 239,) and in that case counsel very properly conceded that parol evidence would be admissible in case of simple contract, but only contended against its admissibility in case of negotiable instruments.

In Nash vs. Towne, (5 Wallace, 689, 703) it is said that while parol evidence is not admissible for the purpose of exonerating an agent who has entered into a written contract as principal, yet it is admissible in cases of simple contract, to show that the person named in the contract was an agent, and that he was acting for his principal. " 'Such evidence,' says Baron Parke, 'does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another,' and that principle has been fully adopted by this Court."

So in Whitney vs. Wyman (101 U. S., 392) which was an action on contract created by correspondence, the Court held the corporation and not its agents to be the real contracting parties, and therefore bound. The Court thus declared the law as to simple contracts: "The question is always one of intent; and the Court being untrammeled by any other consideration is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed, and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise." (page 395-6).

In Metcalf vs. Williams (104 U. S. 93) the decision in Mechanics Bank vs. Bank of Columbia (5 Wheaton 326) was again approved and followed.

And again in Hitchcock vs. Buchanan (105 U. S. 416) a bill of exchange headed, "Office of Belleville Nail Mill Co.," and concluding, "charge same to account of Belleville Nail Mill Co., A.B.

Prest., C. D. Secy.," was held on demurrer the bill of the Company and not of the individual signers.

The doctrine of Higgins vs. Senior, that parol evidence may be admitted to charge a principal in simple contract, even when not named at all in the instrument, is fully supported in the following cases:

Williams vs. Bacon, 2 Gray, 387.
Gates vs. Brown, 9 New York, 205.
Dykes vs. Townsend, 24 New York, 57.
Coleman vs. First Natl. Bank of Elmira, 53 New York, 388.
Van Leuven vs. First Natl. Bank of Kingston, 54 N. Y. 671.
Pierson vs. The Atlantic Natl. Bank, 77 New York, 304.
Wiener vs. Whipple, 53 Wisconsin, 298, 302.

An examination of the authorities cited by counsel for Post, will show that the strict rule they contend for has only been applied (1) in actions upon negotiable instrument where the party sought to be charged was not named in the paper at all (as in Stackpole vs. Arnold, 11 Mass. 27); or, (2) in cases where the instrument was under seal and required to be, in those States where the distinction between sealed and unsealed instruments is still closely observed, or, (3) in a few cases where the contract was one required to be in writing by the statute of frauds; but in no instance has the rule been applied where the contract was valid as a parol agreement, was not declared on in the pleading, but in connection with parol proof charging the principal, was used to show the particular terms and conditions of the contract. In the case at bar, the partner Whitney in his separate answer, it will be noticed, admits the contract substantially as pleaded, but denies the breach. No objection was made to the introduction of the contract in evidence. What rule of evidence can be invoked to exclude parol testimony of the names of the members of a co-partnership doing business under a fictitious name, in connection with (not to contradict) a memorandum in writing clearly intended to bind that co-partnership as this one is, and under no possible construction intended to be the contract of one member only?

Perhaps as fair a statement of a conservative view of the question as can be found, is that given in Evans vs. Wells, cited (22 Wend. 325): "Where a contract is not necessary to be in writing to give it validity, the constituent may be bound by an agreement of his agent, which is in fact made for his benefit, although he is not named at the time, and sometimes when he is not known to the party with whom his agent contracts; and even where it is necessary for the contract to be in writing to give it validity, the constituent may be bound by it, if it appear in any part of the instrument that it was intended to be executed by his agent for him in his character of agent merely."

This does not contradict the doctrine of Fenley vs. Stewart, (5 Sandf. 101) already quoted in this brief, and which induced the ruling on the demurrer.

Upon either theory, we claim the Keets Mining Company was clearly liable on this contract. (1) If the contract had been in Whitney's name, without disclosing any agency, it would have been perfectly competent, following the rule of Higgins vs. Senior, and the multitude of authorities supporting it, to show by parol testimony that he acted as agent for the Keets Mining Company, and that it was the real party in interest, deriving the benefit and incurring the liability. (2) But we are relieved of the embarrassment of inquiring whether the language of the Dakota Civil Code cited, (Sec. 1373) is a limitation upon that doctrine, or only a rule of interpretation applied to negotiable instruments and contracts sued upon that are required to be in writing,—by finding from the language of this memorandum of an agreement, that viewed in the light of the decisions upon which Section 1373 is evidently based, we are clearly within its purview, and that the intent to bind the Keets Mining Company "is plainly inferable from the instrument itself."

The Supreme Court of Dakota was unanimous in holding Post liable. From the concluding language of the opinion, given by Justice Moody, we quote (9 N. W. Reporter, 684): "Placing ourselves in the position of the parties as we have a right to do, and viewing the surrounding circumstances from their standpoint, we perceive the contract relates to the manipulation of and making productive the co-partnership property, the turning into usefulness, into gold bullion, the very property itself; that the party signing as superintendent was such, and had the conduct and management of the Company's business; and when we take into consideration the situation of the parties thereto, its peculiar wording, the manner of signing, and that the co-partnership did actually carry on and conduct the business under and reap the benefit of the contract, and enjoy the use of the plaintiff's mill by reason thereof, and examine the instrument in the light of all these facts, the inference therefrom is not only plain, but conclusive, that it was the intention of this agent of the firm, this superintendent, this member, to bind the company, as well as that of the other party that it should be bound. And such being the intention thus plainly to be inferred from the contract, the company was bound by its terms,--the defendant Post as well as the other partner."

We respectfully submit that there was no error committed in the trial court, and that its decision, affirmed by the Dakota Supreme Court, should be affirmed here. And it occurs to us, that in view of the justice of the claim, of the stipulated facts showing Post's liability, and of the great weight of authority in our favor on the questions of law, the courts of England and of this country almost without exception justifying and supporting the rulings made; and considering the value of money in the frontier district whence this case comes, the high rates of interest paid, and the loss and deprivation necessarily suffered by the defendant in error, and that the writ of error in this case has delayed the proceedings in the judgment of the inferior court for four years, it would come within that class of cases mentioned in Rule No. 23 of this court, where the writ appears to have been sued out merely for delay, and that damages at the rate of 10 per cent. in addition to interest should be awarded upon the amount of the judgment.

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